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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-380

IRONWORKERS LOCAL 86, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-69) is reported at 443 F.2d 544. The opinion of the district court is reported at 315 F. Supp. 1202.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1971. On July 16, 1971, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to September 15, 1971. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below properly construed the "pattern or practice" provision contained in Title VII of the 1964 Civil Rights Act.

2. Whether, in light of the findings below that petitioners had deliberately discriminated on the basis of race in their job referrals, membership practices, and training programs, petitioners were properly required to adopt a plan designed to overcome the effects of that discrimination, including the requirement that, to the extent qualified applicants are available, specific goals of minority manpower participation be realized.

STATUTE INVOLVED

The applicable provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth in the Appendix, *infra*.

STATEMENT

This suit was brought by the United States against the four petitioner construction unions and the two petitioner Joint Apprenticeship Committees pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to enjoin all of them from continuing to engage in a pattern or practice of racially discriminatory employment practices against blacks.[1] The complaint alleged that the unions were denying

[1] Operating Engineers Local 302 and the Ironworkers' Joint Apprenticeship Committee were also named as defendants. Prior to trial the United States entered into a consent decree with the Operating Engineers, providing for the creation and operation of a training program with specific goals for minority participation. The Joint Apprenticeship Committee proceeded to trial and was found to be engaged in racially discriminatory

membership and work opportunities to blacks because of their race and that the apprenticeship committees were refusing to admit blacks into training programs on account of their race. The United States sought injunctive relief barring such discrimination in the future and requiring that reasonable steps be taken to overcome prior racially discriminatory policies.

After an extended trial,[2] the district court concluded that all of the unions and apprenticeship committees had, in violation of Title VII, pursued a pattern or practice of conduct which denied blacks, on account of their race, equal employment opportunities in the construction industry. Specifically, the court found that there were only five blacks in the four unions, whose combined membership totaled approximately fifty-five hundred (see Pet. App. 78). In the training programs administered by the apprenticeship committees, there were seven blacks out of a combined total in excess of two hundred (Pet. App. 79).

Within this context the court found numerous examples of the ways in which the unions and apprenticeship committees excluded blacks from work and training opportunities. At various times, for example,

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practices. However, it did not appeal the district court's judgment and decree. Consequently, neither of these two original parties is before this Court.

[2] Trial commenced on February 17, 1970, and concluded on March 13, 1970. The district court heard the testimony of fifty-nine witnesses and received into evidence more than fifty depositions along with hundreds of exhibits. See Pet. App. 75. Because the district court's findings and conclusions are not reproduced in the appendix to the petition, some of our factual citations are to the decision of the court of appeals.

the unions subjected black applicants for membership to spurious requirements; applied standards more stringently to them than to whites; gave them false information; and in other ways either discouraged blacks from applying or flatly rejected their applications. With respect to work referral, the unions gave blacks false information in order to discourage their applications; required of them qualifications not required of whites; failed to recruit and refer blacks while at the same time doing so for whites in order to fill urgent demands for workers; and generally refused to accord blacks the use of their hiring halls. Pet. App. 73–74; 315 F. Supp. at 1205–1208, 1213–1214, 1220–1223, 1228–1235.

The court also found that the joint apprenticeship committees denied blacks entrance into training programs by giving preference to friends and relatives of union members, all of whom were white; by treating applications of blacks differently from those of whites and applying more stringent standards to blacks; and by generally discouraging blacks from applying and following through with their applications. Pet. App. 73; 315 F. Supp. at 1215–1216, 1224–1228, 1234–1235.

On the basis of these findings the court issued two orders enjoining future discrimination and requiring that specific affirmative steps be taken to overcome the effects of past discrimination (Pet. App. 32–48; 50–64).[3] The unions and apprenticeship committees ap-

[3] Among other things, the district court ordered the "unions to offer immediate job referrals to previous discriminatees, * * * [ordered the] apprenticeship and training committees to select and indenture sufficient black applicants to overcome past dis-

pealed, contending that the district court erred in both its findings and the affirmative relief granted. The court of appeals affirmed.

ARGUMENT

Title VII of the Civil Rights Act of 1964 vests in the Attorney General a major part of the federal responsibility for implementing the governmental policy of equal employment opportunity. Under Section 707 (a) of the Act he is authorized to bring suit to enjoin a "pattern or practice" of resistance to the rights secured by Title VII. Such a pattern or practice exists where employment practices are followed which have an adverse impact on a class of persons protected by the Act and which are shown to be more than isolated occurrences or abberations from an otherwise nondiscriminatory policy. Once this showing is made the courts have the duty to eliminate future discrimination and to correct, insofar as feasible, the present and continuing effects of past discrimination. Both courts below adhered to these principles, which have been affirmed by many other appellate decisions. Further review by this Court is not warranted.

1. The court of appeals correctly construed the term "pattern or practice" to mean the existence of discriminatory acts which are more than isolated or accidental events (Pet. App. 81–82). This construction is in accordance with the legislative history of the Act[4]

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crimination, and to also meet judicially imposed ceiling requirements in apprenticeship program participation" (Pet. App. A83).

[4] During the debates on the Act Senator Humphrey, the Act's chief proponent, explained that a pattern or practice would be

and with judicial decisions construing the term as it appears in this Act and also in the Civil Rights Acts of 1960 and 1968 (42 U.S.C. 1971(e)—Voting; 42 U.S.C. 3613—Housing). *United States* v. *Jacksonville Terminal Co.*, C.A. 5, No. 30448, decided August 31, 1971, Slip Op. 49–50; *United States* v. *West Peachtree Tenth Corp.*, 437 F.2d 221, 227 (C.A. 5); *United States* v. *Mayton*, 335 F.2d 153, 158–159 (C.A. 5); *United States* v. *Mintzes*, 304 F. Supp. 1305, 1313–1315 (D. Md.).

In applying its definition to this case the court of appeals concurred in the trial court's findings of a pattern or practice based upon: statistical evidence showing an absence of blacks in both the unions and apprenticeship programs;[5] numerous overt discriminatory acts such as refusals to grant work opportunities to black applicants; and the existence of apparently neutral practices which had a differential impact on blacks (Pet. App. 82).

These factual findings do not warrant further review.[6]

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present "when the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature." 110 Cong. Rec. 14270. See also 110 Cong. Rec. 15895 (remarks of Congressman Celler).

[5] The probative value of statistics in cases of racial discrimination is well established, *e.g.*, *Turner* v. *Fouche*, 396 U.S. 346, 360; *State of Alabama* v. *United States*, 304 F.2d 583 (C.A. 5), affirmed, 371 U.S. 37, and has been of particular use in employment discrimination cases. *United States* v. *Jacksonville Terminal Co.*, *supra* at 51; *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 426 (C.A. 8); *Jones* v. *Lee Way Motor Freight*, 431 F.2d 245, 247 (C.A. 10).

[6] Petitioners incorrectly contend that the court of appeals improperly relied upon the "clearly erroneous" doctrine as its standard of review. See generally *Zenith Corporation* v. *Hazel-*

2. The court of appeals also correctly held that "[t]he district court neither abused its discretion in ordering the affirmative relief, nor * * * in any way establish[ed] a system of 'racial quotas' or 'preferences' in violation of section 703(j)" (Pet. App. A. 85). As the court of appeals recognized, underlying the district court's relief decree was the well-established principle that where discriminatory practices are found, the courts have broad remedial power to prevent future discrimination and eliminate the vestiges of past discrimination (Pet. App. A. 84). See generally *Louisiana* v. *United States*, 380 U.S. 145, 154. The appellate courts are virtually unanimous in their recognition of the duty to order affirmative relief to overcome racially discriminatory employment practices.[7] And, indeed, as this Court has recognized in

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tine, 395 U.S. 100, 123. They argue that the clearly erroneous standard is not applicable since the trial court relied on stipulations, depositions, and exhibits, rather than live testimony, in making its findings. If this were the case, there would be some substance in their contention that the appellate courts differ on the standard of review to be accorded such "paper cases." But see *Commissioner* v. *Duberstein*, 363 U.S. 278, 279; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394. In the present case, however, the court of appeals properly rejected the notion that this case was a "paper" one, noting that more than fifty-five witnesses testified before the trial court (Pet. App. 75).

[7] *United States* v. *Jacksonville Terminal Co.*, *supra*; *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (C.A. 2); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (C.A. 4); *United States* v. *Dillon Supply Co.* 429 F.2d 800 (C.A. 4); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (C.A. 10); *United States* v. *IBEW Local 38*, 428 F.2d 144 (C.A. 6); *United States* v. *Sheet Metal Workers Local 36*, 416 F.2d 123 (C.A. 8); *Local 53 Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (C.A. 5).

constitutional cases, race must often be taken into account as part of the remedial process. *Swann* v. *Board of Education,* 402 U.S. 1, 19; *United States* v. *Montgomery County Board of Education,* 395 U.S. 225. See *Porcelli* v. *Titus,* 431 F.2d 1254 (C.A. 3); *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (C.A. 2); cf. *McDaniel* v. *Barresi,* 402 U.S. 39.

Petitioners, however, renew their argument, rejected by both courts below, that Section 703(j) of the Act, 42 U.S.C. 2000e–2(j), prohibits a court from ordering specific and affirmative relief for the benefit of the class of persons discriminated against.[8] They argue this prohibition was violated by the relief granted, which they characterize as granting racial preferences[9] or establishing racial quotas[10] (Pet. 34). As

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[8] On its face, Section 703(j) does not purport to be a prohibition, but is, instead, simply a disclaimer of granting new power. *Contractors Association* v. *Shultz,* 442 F.2d 159, 172 (C.A. 3), certiorari denied, No. 71–106 (Oct. 12, 1971); cf. *Swann* v. *Board of Education* 402 U.S. 1, 16–18 (construing similar provisions in Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, *et seq.*).

[9] The "preferences" complained of (Pet. 35) are merely an extension to blacks of opportunities which have always been afforded whites by the unions and apprenticeship committees. This is apparent from an examination of the trial court's findings of fact. *E.g.,* 315 F. Supp. 1205, 1212, 1230 (provisions allowing applicants to be called for work irrespective of position on out of work list); 315 F. Supp. 1208, 1214, 1220 (granting work referral without regard to experience or qualifications).

[10] With respect to petitioners' contention about "quotas" (Pet. 35), this Court has upheld in constitutional cases the use of numbers or mathematical ratios in the shaping of a remedy to overcome past discrimination. *Swann* v. *Board of*

the court of appeals held and other courts have uniformly recognized, however, when violations of Title VII are found, Section 703(j) is no impediment to the ordering of such affirmative relief. *United States* v. *IBEW Local 38, supra,* at 149; *Jones* v. *Lee Way Motor Freight, supra,* at 250; *United States* v. *Sheet Metal Workers Local 36, supra,* at 140; *Local 53 Asbestos Workers* v. *Vogler, supra,* at 1051, 1053–1055.[11]

Education, 402 U.S. 1, 22–25; *United States* v. *Montgomery County Board of Education*, 395 U.S. 225. Remedial orders in cases of employment discrimination have often required achievement of reasonable levels of black participation in job opportunities. *E.g.*, *Local 53 Asbestos Workers* v. *Vogler*, *supra* at 1051, 1053–1055 (work referral by union on ratio of one white-one black). Cf. *Contractors Association* v. *Shultz*, *supra*.

[11] Petitioners' reliance on *Griggs* v. *Duke Power Co.*, 401 U.S. 424, is misplaced, since the issue there was whether job qualifications, fair in form but discriminatory in operation, were lawful. This Court held that such qualifications were violative of Title VII. The Court was not confronted with the question of what relief a district court could or should grant upon findings of unlawful discrimination. Also, to the extent that *Carter* v. *Gallagher* C.A. 8, No. 71–1181, decided September 9, 1971, petition for rehearing pending decided under 42 U.S.C. 1981, 1983, and the Fourteenth Amendment, is inconsistent with the case at bar, we believe it is wrongly decided and inconsistent with the decisions of this Court and other appellate courts. The United States has filed an *amicus curiae* brief in support of the petition for rehearing in *Carter*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
DAVID L. NORMAN,
Assistant Attorney General.
DAVID L. ROSE,
ROBERT T. MOORE,
FRANK J. PETRAMALO, JR.,
Attorneys.

OCTOBER 1971.

APPENDIX

Section 703(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(c), provides in pertinent part:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; * * *

Section 703(d), 42 U.S.C. 2000e–2(d), provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Section 703(j), 42 U.S.C. 2000e–2(j), provides:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-

> management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage or persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 706(g), 42 U.S.C. 2000e-5(g), provides in pertinent part:

> If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the Court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate * * *.

Section 707(a), 42 U.S.C. 2000e-6(a), provides:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing

with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

U.S. GOVERNMENT PRINTING OFFICE: 1971